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No. 94-538

# In the Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD L. BOERS, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly refused to toll the running of the two-year statute of limitations under the Federal Tort Claims Act, 28 U.S.C. 2401(b).

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' Privacy Act complaint when the complaint was filed after the Privacy Act's limitations period had expired.

3. Whether the court of appeals correctly found that the district court did not abuse its discretion in dismissing petitioners' RICO complaint for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 150-158) is unreported, but the decision is noted at 24 F.3d 244 (Table). The opinions of the district court (Pet. App. 125-132) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 160) was entered on May 2, 1994. A petition for rehearing was denied on May 31, 1994. Pet. App. 159. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners purchased farmland with the assistance of a Farmers Home Administration (FmHA) loan in 1980. After years of unprofitable dairy farming and ranching operations, the farm failed, and FmHA foreclosed on the loan in January, 1987. Petitioners attribute their financial difficulties to actions taken by various governmental employees and agencies. Governmental spraying of pesticides between 1958 and 1966 contaminated the alfalfa, which was grown on petitioners' land as feed for their dairy cows. Consequently, the milk produced by petitioners' dairy cows was also contaminated. Petitioners allege that FmHA knew, but failed to inform them before they bought the land, that the land had been sprayed with pesticides and that the land was infested with stem nematodes, which destroy alfalfa crops. Petitioners further allege that some of their FmHA loans were delayed or denied as a result of governmental negligence or intentional misconduct. Pet. App. 129-130, 151.

Petitioners filed an administrative tort claim in July, 1989, which was denied on January 24, 1991. They subsequently filed two lawsuits: a negligence action against the United States and the United States Department of Agriculture under the Federal Tort Claims Act (FTCA); and a separate complaint including Racketeer Influenced and Corrupt Organizations Act (RICO), Privacy Act, and intentional tort allegations against the United States, the United States Department of Agriculture and Richard Smiley, a former FmHA official. Pet. App. 151-152.[1]

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[1] The court of appeals characterized the intentional tort allegation, which petitioners pled as a breach of the duty of good faith and fair dealing, as an FTCA claim. Pet. App. 151-152.

The defendants answered both complaints in December, 1991, and then, in January, 1992, filed motions to dismiss, which were granted on June 15, 1992. The district court dismissed the FTCA negligence action because petitioners' administrative claim had been filed in July, 1989, more than two years after the last alleged predicate act in January, 1987, and beyond the FTCA's two-year limitations period. Pet. App. 129-132, 148-149. Petitioners did not appeal that dismissal. The intentional tort and Privacy Act claims were dismissed without discussion, apparently also on a statute of limitations basis. *Ibid.*[2] Finally, the district court dismissed the RICO cause of action on the ground that it failed to satisfy the particularity pleading requirement of Federal Rule of Civil Procedure 9(b). Pet. App. 125-128, 147.

Petitioners appealed the dismissal of the intentional tort/Privacy Act/RICO complaint to the Ninth Circuit, which affirmed the district court in an unpublished opinion. Pet. App. 150-158. The court of appeals rejected petitioners' argument that the running of the limitations period should have been tolled until September, 1987, when they learned, in the course of another lawsuit, of the causal connection between the FmHA's negligence in the handling of their loans and the failure of their farm. Petitioners identified their injuries as "the loss of their farm, and attendant financial and emotional

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[2] After its discussion of the statute of limitations in its Memorandum and Order dismissing the FTCA negligence action, the court wrote that "[t]hese conclusions apply with equal force and effect to a companion case pending before this Court, *Boers v. Dept. of Agriculture*, Civ. No. 91-1068 PHX-WPC [the RICO complaint which also contained the Privacy Act and intentional tort allegations]. The only remaining issue in the companion case is a RICO claim." Pet. App. 132. See also *id.* at 126.

setbacks." *Id.* at 156. The court found that petitioners were "well aware" of the three actual causes of those injuries well before September, 1987: DDE spraying; stem nematode infestation; and the lack of adequate and timely loan financing. *Ibid.* The court concluded that it was of no consequence that petitioners were unaware, prior to September, 1987, of the government's alleged contribution to that harm. In those circumstances, the court found that the statute of limitations was not tolled. Noting that the Privacy Act, like the FTCA, contains a two-year statute of limitations (Pet. App. 154), the court of appeals affirmed the dismissal of the Privacy Act claim on that basis.

The court of appeals also upheld the dismissal of petitioners' RICO claim for failure to comply with the pleading requirements of Rule 9(b), and rejected petitioners' argument that the district court erred in dismissing their complaint without allowing them an opportunity to amend it. Pet. App. 157-158. The court noted that petitioners had not sought leave to amend the complaint prior to the district court's dismissal, even in light of the government's motion to dismiss based upon the complaint's inadequacy. The court also noted that petitioners had not indicated, either before the district court or on appeal, any way in which the complaint might be amended to state a valid cause of action under RICO. Moreover, the court stated, "we cannot perceive any basis for a meritorious RICO claim in the circumstances of this case." *Id.* at 158.

## ARGUMENT

1. The court of appeals correctly upheld the dismissal of the tort aspect of the complaint because the administrative tort claim was filed in July, 1989, more than two years after petitioners' claim accrued through

the loss of their farm in January, 1987. The district court lacked jurisdiction over the complaint under the FTCA's two-year statute of limitations. 28 U.S.C. 2401(b) (tort claim against the United States forever barred unless presented within two years after such claim accrues). A claim "accrues" when a plaintiff knows both the existence and the cause of an injury. *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979). Because petitioners were aware, at the time they lost their farm, of the financial and emotional setbacks attendant upon that loss, as well as the actual causes of that loss (DDE, stem nematodes, and loan financing problems), the running of the limitations period was not tolled, notwithstanding petitioners' claim to have learned only later of the government's responsibility for their injuries. See *Kubrick*, 444 U.S. at 122; *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) ("Discovery of the cause of one's injury * * * does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered.").

2. The court of appeals properly sustained the trial court's dismissal of the Privacy Act cause of action against FmHA as time-barred. The complaint did not allege that the cause of action arose or was discovered within the two-year period preceding the filing of the complaint in July, 1991. See 5 U.S.C. 552a(g)(5). In addition, the court of appeals found that the complaint alleged no separate ascertainable Privacy Act injuries. Pet. App. 156-157. Dismissal of the complaint as to the individual defendant Richard Smiley was warranted in that only an "agency" is a proper party defendant in a Privacy Act action. 5 U.S.C. 552a(g)(1); *Bruce* v. *United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980).

3. The court of appeals did not err in upholding the dismissal of the RICO cause of action based on petitioners' failure to comply with Federal Rule of Civil Procedure 9(b), which requires that the circumstances constituting fraud be stated with particularity in a complaint.[3] That requirement has been interpreted to mean that the plaintiff must state the time, place, and specific content of the false representations, as well as the identities of the parties to the misrepresentation. *Schreiber Distributing Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-1401 (9th Cir. 1986); *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The district court found that none of these criteria had been met: "Based on the complaint, it is impossible to define what was allegedly done, when it was allegedly done, how it was allegedly done and precisely who allegedly committed any of the asserted predicate acts." Pet. App. 127.

While Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint shall be freely given when justice so requires,[4] the decision to grant or deny such leave is within the discretion of the district court. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion, the district court may consider such

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[3] Rule 9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

[4] Rule 15(a) provides, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

factors as undue delay; bad faith or dilatory motive on the part of the movant; repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to the opposing party; and futility of the proposed amendment. *Ibid.*; *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

Here, the court of appeals noted that petitioners "did not request permission to amend their complaint before the district court prior to dismissal, even in the face of the government's clear contention in its motion to dismiss that the complaint was inadequate." Pet. App. 158. In the absence of such a request, the district court did not abuse its discretion by failing to grant petitioners leave to amend *sua sponte* prior to dismissing the complaints. See *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994) (footnote omitted) ("Plaintiffs here failed to move to amend their complaint, and it 'could hardly have been an abuse of discretion for the District Court not to have afforded [plaintiffs] such leave *sua sponte*.'").[5] Accord *Black* v. *Payne*, 591 F.2d 83, 89 (9th Cir.) (where case below was decided on a motion to dismiss and appellant asked for leave to amend his complaint for the first time on appeal, "the request to remand with instructions to permit amendment c[ame] too late"), cert. denied, 444 U.S. 867, 985 (1979).

Even if, as petitioners assert (Pet. 8-9), they requested leave to amend after the court dismissed their complaint,

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[5] In *Kowal*, the plaintiffs had thirteen months between the time the defendants filed a motion to dismiss and the time the judge dismissed the complaint, during which they could have requested leave to amend. Here, petitioners had at least five months between the motion to dismiss and the entry of judgment by the district court dismissing the complaint in which to request leave to amend.

the district court did not abuse its discretion in denying or declining to consider such a request. As noted above, both undue delay and prejudice to the opposing party are recognized bases on which to deny a motion to amend. Petitioners' unexplained failure to request leave to amend their complaint, after learning of the government's basis for requesting dismissal and prior to the time the court ruled on the motion, constituted undue delay.

In any event, the court of appeals noted that petitioners had not indicated how they might amend their complaint to state a valid RICO cause of action. Pet. App. 158. The court of appeals also independently determined that the deficiencies in the complaint could not be cured in that the court could not "perceive any basis for a meritorious RICO claim in the circumstances of this case." *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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